

FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

GOVERNMENT OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	
v.	)	CRIMINAL NO. 1992/116
	)	
	)	
ROSINDO GUMBS and WAYNE TODMAN,	)	
	)	
Defendants.	)	
	)	

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**MEMORANDUM and OPINION**

This matter came on for hearing November 25 and December 16, 1992,<sup>1</sup> on defendant Rosindo Gumbs' motion to suppress statements alleged to have been obtained in violation of his rights set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). In this suppression hearing, the government had the burden to establish by a preponderance of the evidence that the challenged statements were admissible. *Colorado v. Connelly*, 479 U.S. 157, 168 (1986). The first statement was made orally to Lieutenant Vincent Georges ("Georges"), the second was made to police officer Frankie Bellot ("Bellot") and the third, a written statement, was obtained by Detective Granville Christopher ("Christopher") and Sergeant

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1. Since the hearing, defendant Rosindo Gumbs has plead guilty to Counts I and II of the Amended Information and the charges against co-defendant Todman has been dismissed. The motion to suppress is not moot, however. Gumbs has yet to be sentenced and, until he is, the remaining counts of this information are still pending.

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Reynold Fraser ("Fraser"). This Court heard testimony from Christopher, Fraser, Georges, Senator Celestino White ("White"), Attorney Michael Lee ("Lee"), Attorney Renee Gumbs, the defendant's sister ("Ms. Gumbs"), Bellot, and the defendant. For the reasons discussed below, all three statements will be suppressed.

**I. THE ORAL STATEMENT TO GEORGES**

**A. Factual Background**

On July 24, 1991, at about 7:30 a.m. Mr. John Lewis ("decedent") was shot to death with an automatic weapon in front of the defendant's residence in a part of the island of St. Thomas known as Bovoni. Although Detective Christopher was not the first officer on the scene when he arrived sometime shortly before 8:00 a.m., he overheard the defendant in a heated discussion with a young man who was telling Gumbs: "You know who shot him. . . . I just left you there talking to him [the decedent]. You know who shot him." (Tr. I at 16)<sup>2</sup>

Lieutenant Georges, Commander of the Investigation Bureau and Christopher's supervisor, was already on the scene and told Christopher that Rosindo Gumbs would have to be questioned as a

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2. References to the transcript are "(Tr. I)" for testimony taken on November 25 and "(Tr. II)" for the continuation of the hearing on December 16.

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potential witness to the murder. (Tr. I at 9) Christopher found the defendant inside his house and, in the presence of defendant's sister, Georges and Senator White, asked defendant to go to the police station to give a statement because he was a witness to the shooting. Christopher testified that Ms. Gumbs objected, saying her brother was inside the house when she heard the shots so he didn't have to go to the station to give any information. She told the detective that she was an attorney, as well as Gumbs' sister. Christopher replied that her brother was not a suspect but a witness. (Tr. I at 11) According to Christopher, both White and Georges explained to Ms. Gumbs that if her brother was a witness, he should cooperate and give a statement of what he observed. (Tr. I at 13, 14) Ms. Gumbs then agreed that her brother could go and the defendant was transported to the Investigation Bureau by other officers. He was placed in the back of the police vehicle behind two officers seated in the front without being arrested or handcuffed. (Tr. I at 13-14, 112)

Detective Christopher did not advise the defendant of his *Miranda* rights at the house because he testified that he did not consider Mr. Gumbs to be a suspect, although Christopher conceded on cross-examination that "it was leaning towards him being a suspect" (Tr. I at 41) and that he probably told the defendant

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that "he had to come with me." (Tr. I at 44) After Gumbs left, detective Christopher transported the young man he had observed talking with Gumbs to the station for questioning. The detective did not see Gumbs at the Investigation Bureau upon arrival and went right to taking a statement from the witness he had brought from the scene.

Shortly after Rosindo Gumbs arrived at the Bureau, he was taken into Lieutenant Georges' office for questioning. Georges testified that while at the scene he had been given information that Gumbs was seen talking to the decedent just before he was shot and had run into the house and come back out with a shotgun. (Tr. I at 79-80) Georges did not advise the defendant of his rights at that time since he considered Gumbs a witness or a potential victim of the shooting. The defendant denied that he had come out with a shotgun, but Georges testified that they kept talking for about half an hour regarding "this gun part." The defendant at one point during this conversation told Georges that he had a Tech 9 about three weeks earlier, "and . . . had given it to 'Q'." (Tr. I at 80) Since Georges knew that the decedent had been killed with an automatic weapon such as a Tech 9, he called Christopher into his office and told him to advise Gumbs of his rights and to try to get a statement from him regarding giving the gun to "Q." Christopher took the defendant to a

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witness room in the Investigation Bureau to advise him of his rights this first time and left him there when he declined to give a statement. (Tr. I at 46, 50) Georges confirmed that Christopher went out with the defendant and later came back to report that Gumbs had refused to give a statement, requesting that he be allowed to speak with his attorney sister before he did so. (Tr. I at 82-83)

Rosindo Gumbs testified at the hearing that he agreed to go with the police to the station on the understanding that he would be able to talk first with his attorney sister. (Tr. I at 266) He recalled talking to Georges at the Investigation Bureau but claimed that he told the detective nothing about a Tech 9. (Tr. I at 288) Although everyone else who testified swore the defendant was never handcuffed, Gumbs stated that when he first got to the Bureau, he was handcuffed to a desk in the waiting area for a little while. (Tr. I at 267-68) The defendant did not mention any other time that he was physically restrained while at the Investigation Bureau on that day.

**B. Discussion**

These facts form the foundation from which the Court has to decide whether or not the alleged statement of the defendant to Georges about the "Tech 9" and "Q" should be suppressed. First, however, the Court as fact finder must

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determine whether or not the statement was made.

In weighing the testimony and credibility of the witnesses, including their biases and relations to the parties, together with the facts and circumstances of the case developed on the record at this two-day hearing, the Court finds that Georges had no knowledge of a "Tech 9" being involved in the case before speaking with the defendant. The Court further finds that the defendant did make the statement to Georges, although he now denies it.

Next, the Court must determine whether the defendant was subjected to custodial interrogation at the time the statement was made, and, therefore, should have been read his *Miranda* rights. In *Miranda v. Arizona*, the Supreme Court held, among other things, that a person in custody must be read his rights before he may be interrogated by the police. Unless a defendant has been read his *Miranda* rights, any statement obtained during a "custodial interrogation" cannot be used as evidence against the defendant. The Supreme Court has defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda* at 444.

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Whether a person is in custody when a statement is made is determined on a case by case basis. *United States v. Mesa*, 638 F.2d 582, 584 (3d Cir. 1980). The objective test is "whether the government has in some meaningful way imposed restraints on [a person's] freedom of action," *Yount v. Patton*, 710 F.2d 956, 961 (3d Cir. 1983), *rev'd on other grounds*, 467 U.S. 1025 (1984). In *Patton*, the court elaborated that where the individual has not been openly arrested, "something must be said or done by the authorities, either in their manner of approach or in the tone or extent of questioning, which indicates that they would not have heeded a request [of the individual] to depart" and that the circumstances surrounding the statement "must be scrutinized with extreme care for any taint of psychological compulsion or intimidation" when the questioning occurs at the police station. *Id.* at 961.

The Court finds that Detective Christopher's insistence that the defendant go to the police station to give an account of what happened suggests restraint on his liberty. In addition, the defendant was transported to the station in a police car, rather than being allowed the opportunity to make his own way there. Even without crediting the defendant's testimony that he was handcuffed to a desk in the waiting room for a short time,

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the defendant clearly believed that he was not free to leave after being placed in an interview room when he first arrived.

This Court is mindful that the Third Circuit in *Patton* cautioned that "custody" must not be read too broadly, noting that *Miranda* warnings are not required just because the questioning takes place in the station house. *Patton*, 710 F.2d at 495. The Court nevertheless finds that the detectives had determined that the defendant's statement was sufficiently important to their investigation that the defendant would not have been allowed to leave the Investigation Bureau had he requested to do so. It follows that the defendant was in custody within the meaning of *Miranda* at the time Lt. Georges questioned him about the shotgun and elicited the challenged statement from defendant regarding "Q" and the "Tech 9."<sup>3</sup>

Accordingly, it does not matter whether Georges believed that the defendant was a witness or a suspect. The fact that the defendant was subject to custodial interrogation without having been read his rights is a violation of *Miranda* and requires that any statement made by Rosindo Gumbs during that questioning by Lt. Georges be suppressed.

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3. There is no question in this case that the defendant was being "interrogated" by Lt. Georges. *Cf. Rhode Island v. Innis*, 446 U.S. 291 (1980).



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II. ORAL STATEMENT TO BELLOT AND WRITTEN STATEMENT  
TO DETECTIVES

A. Factual Background

After Lt. Georges was advised by Detective Christopher that the defendant refused to give a statement until he could talk with his sister, three suspects in the shooting were picked up and brought to the Investigation Bureau for processing. (Tr. I at 83) As a result Gumbs was left alone while the three suspects occupied the detectives' attention for a time. At some point about mid-morning, Attorneys Michael Lee and Renee Gumbs went to Georges' office. (Tr. I at 85) Georges recalled talking to the two attorneys and explaining that the police needed to get information from Rosindo Gumbs because he was a witness to the homicide.

Detective Christopher testified that after Gumbs told him he wanted to wait for his sister before making any statement, he went back to taking the statement from the other witness (Tr. I at 19), which he completed at about 10:10 a.m. (Tr. I at 20, 26) Shortly thereafter Christopher saw the defendant's sister and Lee in Georges' office (Tr. I at 22), and was met in the hallway on the way to Major Crimes from the Investigation Bureau by Lee, Ms. Gumbs and the defendant, as well as Georges, who indicated that the defendant was going to give a statement. (Tr. I at 59)

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Sergeant Reynold Fraser, supervisor of the Major Crimes Unit, had returned from the murder scene, joined the group, and walked back to his office at Major Crimes. (Tr. I at 116)

Detectives Fraser and Christopher testified that Lee and Ms. Gumbs conferred privately with the defendant in Fraser's office at Major Crimes for a few minutes before Gumbs' statement was taken, while Christopher and Fraser waited in the outer office. Fraser said the meeting was after Gumbs was readvised of his rights (Tr. I at 118-19), whereas Christopher could not really recall whether it was before or after he read the defendant his rights for the second time. (Tr. I at 63) Georges also recalled that Lee and Ms. Gumbs talked privately with the defendant, either in the witness room in the Investigation Bureau next to his office or in the Major Crimes office down the hall from the Investigation Bureau. (Tr. I at 88-89)

After thus conferring with his client, Lee indicated the defendant's statement could be taken, according to Fraser. (Tr. I at 61, 120) The interview began at about 10:30 a.m., with Christopher taking the statement in the presence of Fraser, Lee and Ms. Gumbs, and was completed at 12:45 p.m. (Tr. I at 27-28, 31) Fraser said he was present for most of the statement, except when he went outside for a few minutes with Lee to "chit-chat" about cases they had worked on while Lee was an Assistant

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Attorney General. They were joined in the hall for a couple of minutes by Ms. Gumbs and then went back inside while Christopher continued taking the statement. (Tr. I at 121-22) Both Christopher and Fraser were clear that the defendant and Lee read the statement and Lee told the defendant to go ahead and sign it. (Tr. I at 34, 122) Georges testified that he also saw Lee later in the Major Crimes office reading a statement that the defendant had given to the detectives. (Tr. I at 104)

When cross-examined by defense counsel why neither Lee nor Ms. Gumbs witnessed the defendant's statement, Fraser testified that it is not the practice to do so or to list on the statement who was present at the taking of the statement, even when it is the witness' attorney. (Tr. I at 127) Fraser explained that he had noted the presence of counsel on another statement he took in this case because a judge had ordered that the attorney be present while that statement was taken. (Tr. I at 127)

The foregoing sworn testimony of Georges, Fraser and Christopher regarding the written statement from the defendant was flatly contradicted by Attorneys Lee and Gumbs, as well as the defendant. Lee testified that as a result of a telephone call from Ms. Gumbs earlier that morning, he met her at the federal building and they walked across to the Investigation

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Bureau in the Criminal Justice Complex. (Tr. I at 160-164) Ms. Gumbs believed it was about 9:00 to 9:30 a.m. when the two met. (Tr. I at 161-164) She briefly told Lee what had happened, and he asked her for one dollar "so he would have a client." (Tr. I at 164) She testified that she did not then know whether her brother was being treated as a suspect or just a witness. (Tr. I at 241)

At the Investigation Bureau Ms. Gumbs and Lee informed Lt. Georges that they were there on behalf of and to represent Rosindo Gumbs. (Tr. I at 166 & 250) Both Attorneys Lee and Gumbs could not clearly remember how many times Lee asked Georges to see his client, but they thought it was at least once, and maybe another time. (Tr. I at 166, 173-174, 255-256) Lee also did not recall Georges response to his question. (Tr. I at 173) Lee was, however, able to remember that Georges said Rosindo Gumbs was not considered a suspect, that he was only a witness, and that the defendant was either giving a statement or was somewhere else. (Tr. I at 174) Lee further testified that he spent a considerable amount of time in Georges' office but could not be any more definite. (Tr. I at 191) Ms. Gumbs estimated that they spent at least one and one-half hours and maybe as much as three and one-half hours sitting in Georges' office. (Tr. I at 258-259) Lee could recall that it was early afternoon when he left

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the Investigation Bureau with the defendant and his sister, which he said was the first time he spoke to or saw his client at the station. (Tr. I at 168-169) Lee asserted that Gumbs would never have given a statement if he, Lee, had been allowed to see him. (Tr. I at 167-168). Nevertheless, after learning that his "client" had made an uncounseled statement while Lee was in the building trying to see him, the attorney conceded that he made no protest, nor did he make any notes of the events of the morning or early afternoon. (Tr. I at 175-176)

Ms. Gumbs' memory was not much better; although she believed that Lee did ask to see the defendant, she could not recall Georges' answer. (Tr. I at 249) Attorney Gumbs says she was not present when her brother gave the statement and does not remember spending a few minutes alone with her brother. Although she could not recall for sure, Ms. Gumbs stated that it is possible she and Lee spoke privately in a small room with her brother. (Tr. I at 246-247) The attorney-sister also did not know, but agreed that it was possible, that Lee read the statement and told her brother to sign it. (Tr. I at 247)

Rosindo Gumbs testified that he wanted to be able to talk to his sister before he left his home to go to the station; that Christopher did not want to wait for him to talk to her at the house before he went to the police station; that he would be able

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to talk to her later but the police wanted him to come down to the station; and that he went with them. (Tr. I at 265-66) He agreed that Christopher told him "some rights" and he understood that if he did not want to, he did not have to say anything. (Tr. II at 268) Gumbs stated that after he had signed the advice of rights form declining to give a statement and said that he wanted to talk to his sister, Christopher left for a few minutes. Gumbs then testified that during this time a police officer who was a friend of his named Frankie Bellot came in and asked him what was wrong. The defendant related that Bellot told him what he had heard and that it was best that he, Gumbs, tell whatever he knew. (Tr. I at 269) Officer Bellot asked him more or less the same questions that he had refused to answer for Detective Christopher. Bellot told him he didn't know if the defendant's sister was there and that "Q", also known as Wayne Todman, and some other guys were in the Investigation Bureau being questioned. The defendant said that Bellot asked him if he knew who did the crime and defendant told him he did not know. (Tr. I at 280-82) Then Christopher came back in and asked if he didn't want to give a statement; the defendant said he still wanted to see his sister but Christopher did not answer.

Gumbs went on to testify that he finally gave the statement because they told him that if he did so he would be able to go.

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(Tr. I at 270) The defendant said that Christopher began writing most of what he had told them earlier, and he again asked if he could leave. (Tr. I at 271) He was told if he signed the statement he would be permitted to leave. Defendant signed the document and asked to use the phone but was not allowed to do so. (Tr. I at 271-72) Gumbs stated that he gave the same statement to Georges (Tr. at 272), although he never wavered from wanting his sister with him when he gave a statement.

Defendant further testified that it was a long time after his written statement had been taken that he was told that his sister and Attorney Lee were there and he left with them; which was the first time he had seen them since arriving at the station. (Tr. I at 273-74) Rosindo Gumbs confirmed that Lee had a copy of his statement after the three of them left for Lee's office. (Tr. I at 297)

Fraser was recalled and testified that Officer Bellot was indeed at the station on the morning of July 24, 1992, even though he was not a part of the investigation. (Tr. I at 308-09) He agreed that during the time the defendant was giving his statement in the presence of himself, Christopher, Lee and Ms. Gumbs, Bellot knocked on the door to Major Crimes. (Tr. I at 310) It was about 11:00 a.m. and they were in the process of debriefing the defendant before writing down his statement. (Tr.

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I at 317) Fraser said he told Bellot that he was in conference with the defendant and that everything was all right. Bellot was not allowed entry and he left. (Tr. I at 310-11)

Frankie Bellot had been a Virgin Islands police officer on patrol duty since February of 1991, approximately five months before the murder in question. He testified that on July 24, 1991 he was in uniform on duty in the patrol division when he heard over the police radio that a shooting had occurred in front of the Gumbs' residence in Bovoni. (Tr. II at 9) Since he was a good friend of Rosindo Gumbs, nicknamed "Jabba" (Tr. II at 13), for approximately nine to ten years, he became concerned about the family and in particular his friend, and took it upon himself to go to the Investigation Bureau as a friend of the Gumbs' family. (Tr. II at 25-26) Bellot said that he saw Lt. Georges at the Investigation Bureau, told him he was a friend of Gumbs and Georges told him it was all right to talk to the defendant. (Tr. II at 12) Georges also told him that Gumbs was just a witness.

Bellot was directed to the Major Crimes Office, passing Attorneys Lee and Gumbs as they were coming into the Investigation Bureau sometime between 9:00 and 10:00 a.m. (Tr. II at 11, 48) When Bellot arrived at the Major Crimes' Office,



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he met Detective Christopher with the defendant and another detective. It was clear to Bellot that the detectives had been talking with the defendant and that Gumbs had refused to answer any questions. Although Bellot had just seen Attorney Gumbs, he said nothing when his "friend," the defendant, asked him to get in touch with his sister. (Tr. II at 69) Bellot asked and was allowed by the detectives to go alone with the defendant into a separate office and speak to him with the door closed. (Tr. II at 14-15) While alone in the room, the defendant told Bellot basically the same thing as contained in the written statement which is the subject of this motion. (Tr. II at 16-20) The testimony of both the defendant and Officer Bellot made clear that Gumbs was talking to Bellot as a friend. After hearing what the defendant had to say, Bellot told him that if he had nothing to hide, he should cooperate with the investigators and tell them what they wanted to know. Bellot testified that the defendant then agreed to speak with them. (Tr. II at 18-19, 29)

When the two of them came out of the separate room, Bellot told the detectives, in front of Gumbs, what he and Gumbs had been talking about (Tr. II at 39) and told Gumbs to go ahead and talk to the investigators, to "tell them what you tell me." (Tr. II at 34-35) Bellot then left Major Crimes and went back to the Investigation Bureau to see if he could talk to "Q," "to find out

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his side of the story." (Tr. II at 35-36) He was again allowed to have a brief, private conversation in one of the interview rooms with "Q", also known as Wayne Todman, co-defendant in this case and one of the three suspects brought in for questioning and processing. Meanwhile, according to Bellot, Gumbs had been moved from Major Crimes back to the Bureau and placed in the adjoining witness room, where Bellot had another discussion with him. (Tr. II at 44-45) All this by an armed police officer in full uniform who was never officially assigned to or involved with the case. (Tr. II at 41) Bellot said that "I was talking to 'Jabba' and talking to 'Q' like back and forth trying to make sense of what [they were telling me]." (Tr. II at 52) What Bellot learned as a result of these conversations tracks closely with the content of defendant's written statement and statements of other witnesses introduced at the hearing. At some point, apparently while Bellot was in speaking with "Q", the defendant was taken back to Major Crimes. When Bellot attempted get into the Major Crimes office again, Fraser would not permit him to see the defendant, telling him that everything was "cool." (Tr. II at 37-38, 54) At that point, "about 11:30 a.m., minutes to 12:00 noon," Bellot left the building and went back to his patrol duty. (Tr. II at 38)

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This was not, however, the last time Patrolman Bellot gained information from the defendant. Bellot testified that he saw the defendant later on the street before Gumbs left for Florida and said something about who did the shooting. In response, according to Bellot, the defendant said, "that's Avery, them man say he did the shooting." (Tr. II at 56, 58-59) The closeness of Officer Bellot's relationship with the Gumbs family was established by his testimony that the defendant's mother asked him to take care of her son's automobile while he was gone. He offered to buy the car, a black BMW with "Jabba" written on it for \$3,000.00, which was not enough money. Bellot nevertheless did take care of the car and drove it back and forth to work while the defendant was off-island. (Tr. II 59-61) Officer Bellot testified that he only saw Attorneys Lee and Gumbs one time as they were coming into the Investigation Bureau. Further, he was not able to hear any voices or see inside the Major Crimes' Office later when Fraser did not allow him to continue his discussions with the defendant. (Tr. II at 62, 79)

**B. Discussion**

It is clear from the facts before the Court that at 8:47 a.m. Rosindo Gumbs refused to answer any questions until he had an opportunity to talk to his attorney sister. Once the defendant invoked his right to counsel and declined to waive his

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*Miranda* rights, the police officers were not permitted to question him any further without the presence of his sister or other counsel. *Edwards v. Arizona*, 451 U.S. 477 (1981). There is no evidence before the Court that the defendant himself may have initiated further communication, exchanges, or conversations with the police, or otherwise waived his rights to counsel after invoking it. Rather, the government says that the written statement was given with the advice and consent of counsel. The government has not represented that it would not use the oral statement to Bellot.

The testimony the Court has before it from the police officers, on the one hand, and Lee, Ms. Gumbs and the defendant, on the other, presents two completely different versions of how the defendant came to give a written statement to the police on July 24, 1992, after initially refusing to do so unless his attorney sister was present. Therefore, the Court as the finder of fact in this situation initially must weigh the credibility, motives and biases of the parties involved, review the various inconsistencies that arose in the testimony and evaluate the overall conduct of the police in dealing with Gumbs.

Michael Lee is an experienced attorney who worked for one and one-half years as a prosecutor, an assistant attorney general, for the local government. His ethical duty as an

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attorney was to demand emphatically to see his client immediately upon being told at the police station that his client was probably giving a statement somewhere in the building, regardless whether the police said they viewed him as a witness and not a suspect. The Court simply finds not believable Lee's testimony that he spent a considerable amount of time, up to as much as three and one-half hours according to Ms. Gumbs, chatting in Georges' office while his client was off somewhere possibly giving an incriminating statement to the police. Similarly, it is inconceivable that the Commander of the Investigation Bureau would be sitting and chatting with Lee and Ms. Gumbs while three suspects in the morning's homicide were being processed and questioned, as the testimony of Lee and Ms. Gumbs would lead one to believe. Further, it is not credible that Lt. Georges, who knew Ms. Gumbs to be an attorney clerking for the Presiding Judge of the Territorial Court, would have denied her access to her brother.

The Court has the same credibility problems with the testimony of Attorney Gumbs. She testified that it could have been possible, but she did not know, that she had talked privately with her brother at the station. She further testified that it was possible, but she could not recall, that Lee read the statement and told her brother to sign it. Although Ms. Gumbs'

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memory was very vague, she was careful to try not to directly contradict the officers' testimony; if anything, her evidence supports the testimony of the police officers that her brother on the advice of his attorney, Michael Lee, did indeed give a statement in the presence of her and Attorney Lee.<sup>4</sup>

On the other hand, the Court is troubled by aspects of testimony or lack of evidence from the government. For example, the seeming inconsistencies between Detective Fraser's testimony given at the preliminary and detention hearings in this case in Florida on September 18, 1992, and the testimony he gave at this suppression hearing give cause for concern. Defense counsel attempted to impeach Fraser with his testimony in Florida that Gumbs was the focus of the investigation from the date of the incident; Fraser indicated that focusing on Gumbs as someone with information is different than focusing on him as a suspect. (Tr. I at 145-46) Counsel for the defendant pointed out that Fraser told the Florida court that Attorney Lee arrived shortly after the defendant was questioned about the murder; Fraser answered that Attorney Lee arrived after Gumbs was questioned; however,

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4. The testimony of both attorneys as officers of the Court leaves much to be desired and should be an appropriate subject of investigation by the respective ethics subcommittees of the Bar Association, if not by the office of the United States Attorney for perjury or false statements.

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Gumbs was questioned two times. (Tr. I at 147-49) There was no clarification whether Lee came in after the first or second time the defendant was questioned.

Most troubling is the conduct of the police officers in dealing with this defendant. The un rebutted evidence before the Court is that the Commander of the Investigation Bureau and the detectives assigned to the Major Crimes Unit permitted a uniformed police officer with five months' experience, and with no official connection to the case, to range freely among the witnesses and suspects being held for questioning in this murder investigation. After the defendant invoked his right to counsel, Officer Bellot was allowed into the Major Crimes unit to talk to the defendant about the homicide and apparently convinced Gumbs to talk to the detectives. From Bellot's testimony, it was only a few minutes after his conversation with the defendant at Major Crimes that the detectives began taking a statement. Bellot testified that he spoke to the defendant a second time in the Investigation Bureau, but was not allowed to speak with him a third time after Gumbs was taken back to the Major Crimes office. These actions constituted misconduct not only by Officer Bellot, but also by the commander and detectives in the Investigation Bureau who allowed it.

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The Court holds that Officer Bellot, a supposed friend and police officer in full uniform being permitted to have a private conversation and question Gumbs after the defendant had invoked his *Miranda* right to counsel, violated Gumbs' right to have counsel present for all subsequent questioning by the police and therefore was improper. The Court finds that the defendant did not waive his request to consult counsel and did not initiate this conversation with Officer Bellot or the detectives. The Court must now decide whether the subsequent written statement is admissible, that is, whether the detectives cured their initial *Miranda/Edwards* violation by readvising the defendant and obtaining his waiver of rights in the presence of and with the advice of counsel.<sup>5</sup>

In determining whether the initial violation of the defendant's rights tainted the subsequent written statement, the

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5. The Supreme Court in *Oregon v. Elstad*, 470 U.S. 298 (1985), held that the fifth amendment does not require the suppression of a confession, made after the proper *Miranda* warnings and a valid waiver, solely because the police had obtained an earlier unwarned admission from the suspect. *Elstad* is not controlling here, where Gumbs had invoked his sixth amendment right to counsel and that right was knowingly and purposely violated by the detectives. Unlike *Elstad*, this case does not involve a failure to warn but involves a constitutional violation due to wrongful police conduct, which requires a different analysis. *Elstad* does not displace the underlying "fruits" doctrine when sixth amendment rights are violated. See, *Hamilton v. Nix*, 781 F.2d 619, p. 625 n.7 (8th Cir. 1985), rev'd and remanded 809 F.2d 463 (8th Cir. 1987), cert. denied 483 U.S. 1023 (1987).



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Court must consider the following factors: (1) the amount of time between the written statement and the unconstitutional activity; (2) the presence of any intervening circumstances; and (3) the purpose and flagrancy of the official conduct. *Brown v. Illinois*, 422 U.S. 590, 603-604 (1975). The Court has already noted that it was only a matter of minutes between the improper police conduct and the taking of the statement. The intervening circumstances were the defendant's opportunity to speak and consult with Attorney Lee and his sister. In many instances, the opportunity to talk to an attorney before making a statement and to have him/her present during the questioning may be sufficient to purge the taint of an earlier violation of the suspect's *Miranda* rights. In this case, however, the detectives willfully allowed the uniformed officer to talk with the defendant knowing that he had refused to answer any questions without counsel present. The Court will not condone or encourage this police misconduct and finds it was sufficiently egregious to render the subsequent written statement inadmissible, despite the readvising of *Miranda* rights and the presence and opportunity to consult with counsel while reducing the statement to writing.

Accordingly, the Court finds that the government has not carried its burden of proving the admissibility of the oral

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statement to Bellot and the subsequent written statement to the detectives.

III. CONCLUSION

For the foregoing reasons, the defendant's oral statement made to Lieutenant Georges, the oral statements made to Officer Bellot and the written statement taken by Detective Christopher and Sergeant Fraser will be suppressed.

Accordingly, it is hereby

ORDERED that the motion to suppress is GRANTED.

DATED: July \_\_\_\_, 1993

ENTER:

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Thomas K. Moore  
Chief Judge

ATTEST:  
ORINN F. ARNOLD, CLERK

BY: \_\_\_\_\_  
DEPUTY

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cc: Maria Hodge  
Susan Via  
Stephen Brusch